

IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES)

v.)

MANNING, Bradley E., PFC)
U.S. Army, (b) (6))
Headquarters and Headquarters Company,)
U.S. Army Garrison, Joint Base Myer-)
Henderson Hall, Fort Myer, VA 22211)

**RULING: DEFENSE MOTION
TO COMPEL DISCOVERY #2**

DATED: 22 June 2012

On 10 May 2012, Defense Moved to Compel Discovery #2 in accordance with (IAW) RCM 701(a)(2), 701(a)(5), 701(a)(6) and 905(b)(4), Article 46, UCMJ, and the Fifth and Sixth Amendments to the Constitution. On 2 June 2012, Defense filed a Motion for Modified Relief. On 7 June 2012, Defense filed an addendum to the Motion to Compel Discovery #2 and on 18 June 2012, Defense filed a second addendum. Government opposes. On 31 May 2012, Government provided the Court Notice of ONCIX damage assessment. On 2 June 2012, Defense responded. After considering the pleadings, evidence presented, and argument of counsel, the Court finds and concludes the following:

Discovery at Issue:

1. Full investigative files by the Army Criminal Investigation Division (CID), Defense Intelligence Agency (DIA), Defense Information Systems Agency (DISA), and United States Central Command (CENTCOM) and United States Southern Command (SOUTHCOM) related to PFC Manning, WikiLeaks, and/or the damage occasioned by the alleged leaks IAW RCM 702(a)(2).
2. The Headquarters Department of the Army (HQDA) file related to the 17 April 2012 discovery request IAW RCM 701(a)(2) and RCM 701(a)(6).
3. The entire FBI, Diplomatic Security Service (DSS), Department of State (DOS), Department of Justice (DOJ), Government Agency, Office of the Director of National Intelligence (ODNI), and Office of the National Counterintelligence Executive (ONCIX) files in relation to PFC Manning and/or WikiLeaks (in the alternative produced for *in camera review* to determine whether the evidence is discoverable under RCM 701(a)(2)). If the Court determines that the files are not within the possession, custody, or control of military authorities, Defense requests the Court order production as relevant and necessary under RCM 703(f).
 - a. FBI (1) FBI investigation. Defense alleges Government has produced heavily redacted files containing only material favorable to the defense and moves for discovery of the entire report of investigation involving PFC Manning or WikiLeaks.

(2) On 31 May 2012, the Government notified Defense that the FBI conducted an Impact Statement for which the Government intends to file an *ex parte* motion under MRE 505(g)(2).

b. DSS Defense alleges Government has disclosed only items charged in specification 14 of Charge II and moves to compel DSS files dealing with Specifications 12 and 13 of Charge II. Government states it has disclosed the entire file.

c. DOS – Defense moves to compel:

(1) Chief of Mission review of released cables at affected posts concerning their initial assessment as well as their opinion regarding the overall effect that WikiLeaks release could have on relations with the host country, if any. The Chiefs of Mission produced written assessments of the leaked cables based upon their independent review. These written submissions were then used to formulate a portion of the draft damage assessment completed in August of 2011;

(2) WikiLeaks Working Group documents – particularly written Situation Reports approximately twice a week during the groups time period of operation roughly from 28 November 2010 until 17 December 2010.

(3) Mitigation Team documents particularly written minutes of its meetings and written agendas for its work. Part of the Mitigation Team's efforts concentrated on counterterrorism concerns;

(4) The Persons at Risk Group Information Memorandum for the Secretary of State, matrix to track identified individuals, and formal guidance to all embassies concerning the Department of States' efforts and authorized actions for any identified person at risk;

(5) Information collected by the Director of the Office of Counterintelligence within the Department of State regarding any possible impact from the disclosure of diplomatic cables intended to possibly be used to update the August 2011 draft damage assessment; and

(6) The Department of State's reporting to Congress to include any prepared written statement for Congressional testimony on 7 and 9 December 2010 and Congressional testimony by Ambassador Patrick Kennedy's testimony on 11 March 2011 for members of the House of Representatives and the Senate and the House Permanent Select Committee on Intelligence, and DOS reports to Congress concerning any effect caused by WikiLeaks disclosure and steps undertaken to mitigate them, de 2 briefings for members of the House of Representatives and the Senate in December 2010.

On 8 June 2012, the Court granted the Government's request for 30 days to determine whether the above records exist. On **9 July 2012**, the Government will notify the Court whether such records exist and file a supplemental response to the Defense Motion to Compel Discovery for those records that do exist.

d. DOJ – documents related to the investigation of PFC Manning and WikiLeaks.

e. CIA internal investigation or damage assessment.

f. ODNI Internal Review of DOS cables.

g. ONCIX Documents related to PFC Manning or WikiLeaks. The Government has provided 12 pages of *Brady* material. On 31 May 2012, the Government provided notice to the Court that ONCIX has a draft damage assessment with a coordinated version complete approximately 13 July 2012 and agreed to provide the draft damage assessment to the Court for *in camera* review.

4. Brady material from the Interagency Committee Review, President's Intelligence Advisory Board, House of Representative's Oversight Committee;

5. All evidence intended for use in the Government case-in-chief obtained from DA, DISA, CENTCOM/SOUTHCOM, FBI, DSS, DOS, DOJ, Government Agency, ODNI, and ONCIX.

6. All aggravation evidence the Government intends to introduce in sentencing from DA, DISA, CENTCOM/SOUTHCOM, FBI, DSS, DOS, DOJ, Government Agency, ODNI, and ONCIX.

7. The entire CID, DIA, DISA, and CENTCOM, and SOUTHCOM files related to PFC Manning, WikiLeaks, and/or the damage occasioned by the leaks to include documents, reports, analyses, files, investigations, letters, working papers, and damage assessments. Defense alleges they are material to the preparation of the defense as they will show, what, if any damage was caused by the leaks.

8. Interagency Committee Review: The results of any investigation or review concerning the alleged leaks by Mr. Russell Travers, National Security Staff's Senior Advisor for Information Access and Security Policy. Defense alleges Mr. Travers was asked to lead a comprehensive effort to review the alleged leaks.

9. President's Intelligence Advisory Board: Any report or recommendation concerning the alleged leaks by Chairman Chuck Hagel or any other member of the Intelligence Advisory Board.

10. House Representatives Oversight Committee: The results of any inquiry and testimony taken by House of Representative Oversight Committee led by Representative Darrell Issa. The committee considered the alleged leaks, the actions of Attorney General Eric Holder, and the investigation of PFC Manning.

Defense further moved the Court to require the Government to state with specificity the steps it has taken to comply with RCM 701(a)(6). This issue will be addressed at the Article 39(a) session on 25 June 2012.

The Law:

1. The Due Process Clause of the Fifth Amendment requires the Government to disclose evidence that is material and favorable to the defense, *Brady v. Maryland*, 373 U.S. 83 (1963).

2. Discovery in the military justice system is governed by Article 46, UCMJ, providing equal opportunity for the parties to obtain witnesses and evidence, and RCM 701, implementing Article 46. These rules provide broader discovery than required by *Brady* Constitutional standard. *U.S. v. Williams*, 50 M.J. 46 (C.A.A.F. 1999); *U.S. v. Simmons*, 38 M.J. 376 (C.M.A. 1993), *U.S. v. Behenna*, 70 M.J. 521 (Army Ct. Crim. App. 2011); *U.S. v. Trigueros*, 69 M.J. 604 (Army Ct. Crim. App. 2010). RCM 701(a)(6) requires that trial counsel shall, as soon as practicable, disclose to the defense the existence of evidence known to the trial counsel which reasonably tends to negate the guilt of the accused of an offense charged; reduce the degree of guilt of the accused of an offense charged; or reduce the punishment. RCM 701(a)(2) requires the trial counsel, after service of charges, upon request of the defense, to permit the defense to inspect any books, papers, documents, photographs, tangible objects, buildings or places which are within the possession, custody, or control of military authorities and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial or were obtained from or belonged to the accused. The Court of Appeals for the Armed Forces has interpreted RCM 701(a)(2) to require trial counsel to disclose to the defense discoverable information regardless of when the Government intends to use it. *U.S. v. Luke*, 69 M.J. 309 (C.A.A.F. 2011).

3. The Government has a due diligence duty to search for discoverable information both under *Brady* and RCM 701. The scope of the prosecution's requirement to search government files beyond the prosecutor's own files for discovery under RCM 701 and *Brady v. Maryland*, 373 U.S. 83 (1963) is generally limited to: (1) the files of law enforcement authorities that have participated in the investigation of the subject matter of the charged offenses; (2) investigative files in a related case maintained by an entity closely aligned with the prosecution, and (3) other files, as designated in a defense discovery request that involved a specified type of information within a specified entity. The parameters of the review depends on the relationship of the other governmental entity to the prosecution and the nature of the defense discovery request. The outer parameters are ascertained on a case by case basis. The parameters of the review that must be conducted outside the trial counsel files is dependent on the relationship of the other governmental entity to the prosecution and the nature of the defense discovery request. *U.S. v. Williams*, 50 M.J. 46 (C.A.A.F. 1999) (holding that trial counsel had no duty to review unit disciplinary records for information concerning any investigations or prosecutions of government witnesses, where defense did not specifically request a review of such files. In *Williams*, the defense filed a general request for "any and all investigations or possible prosecutions pending which could be brought against any witness the government intends to call during the trial." *Williams* held this was not a specific request and the trial counsel was not required to review the unit files in which the information was located.) *Williams* went on to state that while the Government has a duty to review prosecution and police files readily available to the prosecution, it is not required to search for "a needle in a haystack".

4. The Government does not have a discovery obligation under RCM 701(a)(2) unless the discovery at issue is within the possession, custody, or control of military authorities, and is material to the preparation of the defense or intended for use by the trial counsel as evidence in

the Prosecution case in chief at trial, or was obtained from or belonged to the accused. To the extent relevant files are known to be under the control of another government entity, the Prosecution must make that fact known to the Defense and engage in good faith efforts to obtain the material. *Williams*, quoting *Simmons*, citing to the Standard 1102.1(a) Commentary, American Bar Association, Criminal Justice Discovery Standards 14 n. 9 (3d ed. 1995).

5. Evidence maintained by other government agencies, whether aligned with the Prosecution or not, are not within the control of military authorities IAW RCM 701(a)(2). (*See analysis to RCM 701(a)(2)* "Except for subsection (e), the rule deals with discovery in terms of disclosure of matters known to or in the possession of a party. Thus, the defense is entitled to disclosure of matters known to the trial counsel or in the possession of military authorities. Except as provided in subsection (e), the defense is not entitled under this rule to disclosure of matters not possessed by military authorities or to have the trial counsel seek out and produce such matters for it.... Subsection (e) may accord the defense the right to have the Government assist the defense to secure evidence or information when not to do so would deny the defense similar access to what the prosecution would have if it were seeking the evidence or the information. See *U.S. v. Killebrew*, 9 MJ 154 (CMA 1980); *Halfacre v. Chambers*, 5 MJ 1099 (CMA 1976)."

6. The burden is on the Defense for production of evidence outside the control of military authorities for discovery under the relevant and necessary standard in RCM 703(f). Evidence that is material to the preparation of the defense under the control of other government agencies can be relevant and necessary for discovery, requiring production of the evidence from the other government entities pursuant to RCM 703(f)(1) and (4)(A).

7. For files pertaining to PFC Manning within the possession, custody, or control of military authorities that the Government is aware of and has searched for *Brady* material, Trial Counsel must turn over to the Defense any information that is obviously material to the preparation of the defense. This does not mean that the Government must search for information material to the preparation of the defense without a specific discovery request. Where a request is necessary, it is required to trigger the trial counsel's duty to disclose as a means of specifying what must be produced. Without such a request a trial counsel might be uncertain as to the extent of the duty to obtain matters not in his/her immediate possession. Any request should state with reasonable specificity what materials are sought. *See analysis to RCM 701(a)*.

Conclusions of Law:

1. **Files under the possession, custody, or control of military authorities.** The Government will seek out and identify such files regarding PFC Manning that involve investigation, damage assessment, or mitigation measures. By **20 July 2012** the Government will notify the Court with a status of whether it anticipates any government entity that is the custodian of classified evidence that is the subject of the Defense Motion to Compel will seek limited disclosure IAW MRE 505(g)(2) or claim a privilege IAW MRE 505(c) for the classified information under that agency's control. Also by **25 July 2012**, if the relevant agency claims a privilege under MRE 505(c) and the Government seeks an *in camera* proceeding under MRE 505(i), the Government will move for an *in camera* proceeding IAW MRE 505(i)(2) and (3) and provide notice to the Defense under MRE 505(i)(4)(A). For all such files where a privilege under MRE 505(c) is not

claimed, by **3 August 2012** the Government will disclose such files regarding PFC Manning that involve investigation, damage assessment, or mitigation measures to the Defense or, submit them to the Court for *in camera review* under RCM 701(g) or for limited disclosure under MRE 505(g)(2).

2. **Aligned Agencies:**

DOJ – Defense moves to compel documents from DOJ related to the accused, WikiLeaks, and/or alleged leaks because the Government collaborated with federal prosecutors within DOJ during the investigation of the accused. Such files are not discoverable under RCM 701(f). As such, the defense has not shown relevance and necessity for production of DOJ files under RCM 703(f).

FBI/DSS – the FBI and DSS are aligned agencies that conducted an investigation of PFC Manning in conjunction with CID. The Government advised the Court it had disclosed the entire DSS investigation to the Defense. The Court finds the Defense has shown that the FBI file (minus grand jury testimony) to the extent relevant to an investigation of PFC Manning, is material to the preparation of the Defense to the extent that it is relevant and necessary for production under RCM 703(f). The Court will review the FBI Impact Statement *in camera* to determine whether it is material to the preparation of the defense to the extent relevant and necessary to require production for disclosure. The Government will **immediately** begin the process of producing the FBI investigative file and impact statement IAW RCM 703(f)(4)(A). By **25 July 2012** the Government will notify the Court with a status of whether it anticipates any government entity that is the custodian of classified evidence that is the subject of the Defense Motion to Compel will seek limited disclosure IAW MRE 505(g)(2) or claim a privilege IAW MRE 505(c) for the classified information under that agency's control. Also by **25 July 2012**, if the relevant Government agency claims a privilege under MRE 505(c) and the Government seeks an *in camera* proceeding under MRE 505(i), the Government will move for an *in camera* proceeding IAW MRE 505(i)(2) and (3) and provide notice to the Defense under MRE 505(i)(4)(A). For all such files where a privilege under MRE 505(c) is not claimed, by **3 August 2012** the Government will disclose such files regarding PFC Manning that involve investigation, damage assessment, or mitigation measures to the Defense or, submit them to the Court for *in camera review* under RCM 701(g) or for limited disclosure under MRE 505(g)(2).

ODNI/ONCIX – NLT **3 August 2012**, The Government will provide the Court with the damage assessment for *in camera review*. The Government has stated in its briefs that ONCIX is not an aligned agency but has not asked the Court to reconsider the portion of the 23 March 2012 ruling stating that it was.

CIA – The Court has conducted an *in camera* review of the WikiLeaks Task Force Damage Assessment and the proposed Government substitute under IAW MRE 505(g)(2). The Court's ruling with respect to this damage assessment is issued as a separate Appellate Exhibit.

3. **Other.**

DOS – The Court granted the Government’s request for 30 days to respond to the Defense Motion to Compel DOS documents. On **9 July 2012** the Government will identify which files exist and provide its position to the Court IAW the Court’s order of 8 June 2012.


17 April 2012 HQDA file – The Government alleges there is no “file”. What, if any, file exists will be addressed at the Article 39(a) session on 25 June 2012.

Government Evidence in Merits/Sentencing – NLT **3 August 2012**, the Government shall disclose evidence it will introduce on the merits and during sentencing.

Interagency Committee Review, President’s Intelligence Advisory Board, and House of Representative Oversight Committee. The Defense moves to compel the Government to conduct *Brady* searches of the files of these entities. These are non-aligned entities who have had no interaction of or involvement with the Prosecution or the Criminal Investigation in this case. Their files are not readily available to the Prosecution. The Prosecution has had no access to these entities or their files. Although the Defense has made a specific request that the Court compel the Government to conduct a *Brady* search of these files, the Court finds that the files of these entities are too attenuated and beyond the outer parameters of the core files the Prosecution must search for *Brady*. The Government advised the Court that it had an ethical obligation to search the President’s Intelligence Advisory Board for *Brady* material because it had reason to believe the files contained *Brady* material. As such, the Government will conduct a *Brady* search of the President’s Intelligence Advisory Board files. The Court does not compel the Prosecution to search the files of the Interagency Committee Review or the House of Representative Oversight Committee.

RULING: The Defense Motion to Compel Discovery #2 is **Granted** in part as set forth above.

So **ORDERED:** this 22nd day of June 2012.


DENISE R. LIND
COL, JA
Chief Judge, 1st Judicial Circuit